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Supreme Court, U.S.
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No. 95-2091

In The

# Supreme Court of the United States

October Term, 1995

J.D. SHARP, SCOTT CANNON and MARSHALL MCDONALD, in their individual capacities,

*Petitioners,*

vs.

SUZANNE MYERS, individually and as administratrix of Thomas Myers, decedent, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

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## PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

Respondents contend the holding in *Behrens vs. Pelletier*, ___ U.S. ___, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996) does not create a right to appeal a denial of summary judgment on individual qualified immunity grounds when issues of fact exist. However, in a most recent analysis of *Behrens* and *Johnson vs. Jones*, ___ U.S.___, 115 S.Ct. 2151 (1995), the second circuit held *Behrens* "laid to rest any possibility that a district court's mere assertion that disputed factual issues existed was enough to preclude an immediate appeal." *Salim vs. Proulx*, 93 F.3d 86 (2nd Cir. 1996).

In *Salim*, the facts reveal that Officer Proulx, a plain clothed police officer, was attempting to locate and apprehend a juvenile, Eric Reyes, who had escaped from a detention center and avoided capture. Officer Proulx was armed only with a .22 handgun. During his search, Officer Proulx spotted Reyes standing near his home. When detected, Reyes ran away and Officer Proulx gave chase. During the chase Reyes threw a rock at the officer which bounced off Proulx's arm and ricocheted off his forehead. Officer Proulx believed Reyes was armed with a knife and fired one shot to force Reyes to retreat.

Eventually, Officer Proulx caught Reyes and both fell to the ground struggling. Officer Proulx had placed his gun back in his pocket and was able to pin Reyes to the ground. At this time, 5 or 6 other juveniles came to the aid of Reyes and began to hit and kick Proulx in order to free Reyes. Somehow Officer Proulx's gun was taken out of his pocket and Reyes was fatally shot. Stipulated facts

detailed that when Officer Proulx saw the barrel of his gun in Reyes' hand, he instinctively grabbed the handle and pulled the trigger. *Salim*, 93 F.3d at 88.

In deciding the case, the district court directed the United States Magistrate to make initial findings and recommendations. The magistrate recommended denying Proulx's motion for summary judgment on qualified immunity by stating genuine issues of material fact existed on whether "a reasonable officer could have believed that the use of deadly force against Eric comported with constitutional requirements." The district court adopted the recommendation of the magistrate and denied Proulx's motion for summary judgment on qualified immunity grounds. *Salim*, at 88.

On appeal Proulx argued and the Second Circuit agreed, that "several fact-related rulings remain appealable" in connection with a district court's denial of summary judgment on individual qualified immunity grounds. In *Salim*, the Second Circuit held "*Behrens* goes further and permits an appeal where a defendant contends that the immunity defense is established on those facts, alleged by the Plaintiff, that the district court ruled were sufficiently supported to create jury issues." *Salim* at 89.

As stated in *Salim*,

> Thus, as long as the defendant can support an immunity defense on stipulated facts, facts accepted for purposes of the appeal, *or the plaintiff's version of the facts that the district judge deemed available for jury resolution, an interlocutory appeal is available to assert that an immunity defense is established as a matter of law.* Usually,

the fact-related issue that will be raised on an interlocutory appeal is whether it was reasonable for the defendant to believe that his action did not violate clearly established law. *See, e.g., Anderson,* 483 U.S. at 641, 107 S.Ct. at 3039-40; *Robinson v. Via,* 821 F.2d 913, 921 (2d Cir.1987). *In addition, Johnson, permits an appeal even on the fact-related issue of whether the defendant acted in the manner alleged by the plaintiff.* Some might have thought that a defendant's claim that he "didn't do it" relates to the merits of the plaintiff's claim, not to the defendant's qualified immunity defense to that claim. However, the Supreme Court made clear in *Johnson* that it regards a defendant's denial that he took the action alleged by the defendant to be within the scope of an immunity defense. *Johnson* itself involved precisely that type of dispute; the Court described that case as "the simple 'we didn't do it' case." *Johnson,* ___ U.S. at ___, 115 S.Ct. at 2158. Yet the Court used a case involving that type of dispute to articulate the ground rules for an appeal of a ruling rejecting an immunity defense.

Evidently, the Supreme Court regards a defendant's claim that he "didn't do it" as within the scope of the qualified immunity defense on the theory that a defendant who did not take the action alleged by the plaintiff did not violate any clearly established law prohibiting such action. In most cases where the defendant contends that he did not violate any clearly established law prohibiting such action. In most cases where the defendant contends that he did not violate clearly established law, the disputed issue is whether the pertinent law was clearly established. But *Johnson* informs us that the

> issue may also be whether the defendant took the alleged action at all.
>
> * * *
>
> An appeal is available, however, to challenge the trial judge's rejection of the immunity defense where the defendant contends that on stipulated facts, or on the facts that the plaintiff alleges are true, or on the facts favorable to the plaintiff that the trial judge concluded the jury might find, the immunity defense is established as a matter of law because those facts show either that he "didn't do it" *or that it was objectively reasonable for him to believe that his action did not violate clearly established law.*

*Salim*, 93 F.3d at 90-91. (emphasis added.) (footnote omitted).

It is interesting to note that in *Salim*, footnote 4, Judge Breyer considered as relevant whether the defendant committed the act alleged by the plaintiff as being determinative of a defendant's qualified immunity defense. (See, *Salim*, 93 F.3d 90, footnote 4).

In the instant case, the district court found petitioners' McDonald and Cannon's actions "were reasonable and justified under the facts and circumstances confronting the officers at the time." (App. 28). This finding was made by the district court after considering Respondents' motion for summary judgment. Also, the District Court found nineteen material issues of uncontested facts (App. 11-13; 24-26) and found that under undisputed fact number 15, that Judge Kelley had issued an Order of Detention and Forcible Entry. Thus, deputies McDonald and Cannon entered the decedent's home

under authority of a warrant and justifiably relied on a neutral unbiased judge making a determination of probable cause to attempt to take Tom Myers into protective custody. Thus, even considering facts favorable to respondents, the district court concluded the actions of McDonald and Cannon were "reasonable and justified" (App. 28). Under such facts, *Salim* dictates an appeal is available under the reasoning of both *Johnson* and *Behrens*.

## CONCLUSION

The holding of the Second Circuit in the case of *Salim vs. Proulx*, 93 F.3d 86 (2nd Cir. 1996) appears to be in conflict with the Tenth Circuit's holding in the present case. Contrary to Respondents' assertions, *Johnson* does permit "an appeal even on the fact-related issue of whether the defendant acted in the manner alleged by the plaintiff." (*Salim*, 93 F.3d at 90)

Petitioners ask this Court to grant Petitioner's Writ for Certiorari in order to remove the conflict of the Tenth Circuit's ruling in the present case with the Second Circuit's ruling in *Salim vs. Proulx*, 93 F.3d 90 (2d Cir. 1996). Petitioners assert *Johnson*, when analyzed by this Court's subsequent decision in *Behrens*, allows appellate jurisdiction of the denial of an individual's qualified immunity defense.

Respectfully submitted,

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